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EXAMINATION OF JURORS PRIOR TO CHALLENGE

The right of challenging a juror for cause seems to be as old as the jury system itself. Glanville and Bracton both speak of it,[1] and the early Year Books contain many cases wherein challenges both to the array and to the polls were interposed and sustained.[2] At common law no peremptory challenges were allowed in civil actions;[3] and they seem to have been originally unknown in criminal causes,[4] for neither Glan-

[1] Glanville, *A Treaties on the Laws and Customs of the Kingdom of England* (Beame's transl. 1912, Legal Classics Series) 50; Bracton, *De Legibus Angliae* (1180-1190) ff. 143, 185, (Twiss' transl. 1879, 1880) Vol. 2, p. 453, Vol. 3, pp. 183-187.

[2] See e. g. *Triple v. Hakeney* (1343) Y. B. 17 Edw. III (Pikes's transl. 1903) 88; *Anonymous* (1344) Y. B. 18 Edw. III (Pike's transl. 1905) 256-260; *Anonymous* (1345) Y. B. 19 Edw. III (Pike's transl. 1906) 146. See also *Atte Wode v. Clifford* (1402-3) reported in *Select Cases before the King's Council* (Selden Society Publications, vol. 35, 1918) 86.

[3] *Gordon v. Chicago* (1903) 201 Ill. 623, 626, 66 N. E. 823, 824; *Sackett v. Ruder* (1890) 152 Mass. 397, 400, 25 N. E. 736, 738.

[4] 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 621, n. 5; 1 Stephen, *History of Criminal Law* (1883) 301. The statute (1305) 33 Edw. I. St.

ville nor Bracton nor Britton mentions them. But by the time of Fortescue, who was Chief Justice of England during a part of the reign of Henry VI, the accused in a capital case had acquired the right of striking thirty-five jurors "peremptorily without assigning any cause for such challenge; and no exceptions are to be taken against such his challenge."[5] At present peremptory challenges in both civil and criminal cases are usually provided for by statute.

In the early cases it was not uncommon for the judge to examine jurors as to their qualifications, even in the absence of challenge, where he had reason to doubt their impartiality.[6] When the jurors came from the same small community as the parties and answered inquiries as of their own knowledge or even upon their consciences,[7] the problem for the litigant of securing adequate information for the intelligent exercise of his challenges was very simple of solution. There was very little, if any, need for a preliminary examination of the jurors. And it seems to have been the custom to permit such examination only after challenge and only with reference to the particular grounds of disqualification alleged.[8] But as society grew more complex and the jury system developed, the jurors ceased to be drawn from among the neighbors and close acquaintances of the parties, and the functions of the jury were transformed from those of witnesses to those of triers of fact upon evidence produced before them in open court. Under such circumstances any preliminary extra-judicial investigation, sufficiently thorough to yield trustworthy information to be used in framing challenges for cause or in exercising peremptory challenges, must be both difficult and expensive. It is not surprising, therefore, to find counsel endeavoring to get the information by means of an examination of the jurors on *voir dire* prior to challenge. The English judges emphatically discountenanced this attempted innovation upon settled practice. That it had never been done was an entirely adequate reason why it should never be done.[9] In

4 seems to indicate that prior thereto the crown might challenge peremptorily without limit.

[5] Fortescue, *De Laudibus Legum Angliae* (Amos's ed. of the transl. of 1775, 1825) 92.

[6] Bracton, *op. cit.* f. 143 (Twiss' transl. *op. cit.* vol. 2, p. 453); *Anonymous* (1339) Y. B. 13 Edw. III (Pike's transl.) 286.

[7] In folio 185 Bracton, speaking of the jury in the assise of novel disseisin says: "But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least." Bracton *op. cit.* f. 185 (Twiss' transl. vol. 3, p. 195).

[8] This is to be gathered not only from the later practice, but also from such passages as that found in Bracton, folio 85, translated thus by Twiss: "Because a present cause ought to be alleged and proved, but not a past cause, etc." See also the form of challenge given in Chapter 34 of the *Mirror of Justices* (1285-1290?) Selden Soceity Publications (1893) vol. 7, p. 116. But if upon an examination on a challenge for one cause, another cause appeared, it seems to have been considered by the court. See *Triple v. Hakeney, supra* note 2.

[9] *Queen v. Stewart* (1845, Q. B.) 1 Cox C. C. 174, Jones, Serjt., attempted to

some American courts it crept in unawares. When brought to the attention of the judges, they hastened to comment on its heterodoxy and to warn counsel that it must not be considered legitimate procedure.[10]

Counsel seem not to have heeded this warning, for the ancient practice disallowing a preliminary examination now persists in only a minority of jurisdictions,[11] and in these it is sought to support it upon reason. It is said that, if such an examination without challenge is permitted, the court (1) will have no control over it, (2) cannot draw the line between proper and improper questions, (3) cannot protect the juror from improper questions, (4) cannot compel the juror to answer proper questions, and (5) cannot detect false excuses of those desiring to escape jury duty: such an examination (6) will be offensive to the juror, and (7) will cause unseemly, vexatious, and expensive delays. It must be obvious that the first five assertions assume an almost incomprehensible impotence in the trial court. They entirely disregard the fact that such examination, when allowed, is not an extra-judicial, but a judicial, proceeding, and is as much under the control of the court as any other part of the trial. The offence to the juror can be no greater,

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put a question to each juryman as he came into the box, and the prosecution objected. "Alderson, B.—'It is quite a new course to catechise a jury in this way.'

"Jones, Serjt.—'I have a right, my lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your lordship will perhaps intimate to the jury, that such of them as are members of this association had better retire from the box.'

"Alderson, B—'I cannot allow you to cross-examine the jury, nor will I intimate to them anything on the subject you mention. If you like to challenge absolutely, you may do so.'"

Reg. v. Dowling (1848) 3 Cox C. C. 509. Here, too, counsel asked the privilege of examining a juror for the purpose of eliciting information on which to base a challenge, admitting that he had no information concerning him. Erle, J., responded: "Then I must refuse your application, unless, indeed, you can quote some authority on the subject. I think it a very unreasonable thing that a juryman should be cross-examined without your having received any information respecting him."

[10] *Negro Matilda v. Mason & Moore* (1822, C. C. D. C.) 2 Cranch C. C. 343. An examination without challenge was allowed, but the court said: "This case must not be drawn into precedent as the court did not mean to sanction such a practice." *State v. Zellers* (1824) 7 N. J. L. 220. The Chief Justice refused to allow counsel to ask a juror if he had not made up and expressed an opinion:

"Wall: 'Do we understand it to be the opinion of the court that we cannot interrogate the juror as to his having formed an opinion;—it has been repeatedly done.'

"Kirkpatrick, C. J.: 'It is true we have slipped into the practice, but on looking into it I am satisfied it is not the true way: the only proper way is, to make the challenge, and then prove it upon oath.'"

[11] *Bales v. State* (1879) 63 Ala. 30; *People v. Hamilton* (1882) 62 Calif. 377; *People v. Trask* (1907) 7 Calif. App. 103, 93 Pac. 891; *Crew v. State* (1901) 113 Ga. 645, 38 S. E. 941; *Clifford v. State* (1898) 61 N. J. L. 217, 39 Atl. 721; *State v. Palmieri* (1919) 93 N. J. L. 195, 107 Atl. 407. But the rule is changed by statute in civil cases in New Jersey. N. J. Pub. Laws, 1911, ch. 151.

and, indeed, will usually be much less, than when preceded by a challenge. As to the delay—in so far as expenditure of time is required to secure an impartial jury, it is entirely justified: in so far as it is made by counsel for improper purposes, the trial court has the remedy at its hand. It is not to be assumed that trial judges will be so shiftless or pusillanimous as to permit counsel to indulge with impunity in misconduct in this or any other part of the trial. The privilege of examining jurors for the purpose of ascertaining the existence of grounds of challenge for cause or of securing data for the intelligent exercise of peremptory challenges is not a privilege to engage in irrelevant and immaterial conversations with prospective jurors without control or supervision by the court.

On the other hand the majority of courts recognize that to deny opportunity for such an examination is greatly to decrease, if not to destroy, the value of the right of challenge.[12] The actual practice

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[12] *Eytinge v. Territory* (1909) 12 Ariz. 131, 100 Pac. 443; *Union Pacific Ry. v. Jones* (1895) 21 Colo. 340, 40 Pac. 891; *Jones v. People* (1896) 23 Colo. 276, 47 Pac. 275; *Donovan v. People* (1891) 139 Ill. 412, 28 N. E. 964; *Baker v. State* (1921, Ind.) 129 N. E. 468; *State v. Dooley* (1894) 89 Iowa, 584, 57 N. W. 414; *Stone v. Monticello Co.* (1909) 135 Ky. 659, 117 S. W. 369; *Hale v. State* (1894) 72 Miss. 140, 16 So. 387; *State v. Mann* (1884) 83 Mo. 589; *State v. Brooks* (1920) 57 Mont. 480, 188 Pac. 942; *Basye v. State* (1895) 45 Neb. 261, 63 N. W. 811; *State v. Douthitt* (1921, N. M.) 194 Pac. 879; *Dresch v. Elliott* (1910) 137 App. Div. 252, 122 N. Y. Supp. 14; *State v. Ellis* (1918) 98 Ohio St. 21, 120 N. E. 218; *Temple v. State* (1918) 15 Okla. Cr. 176, 175 Pac. 733; *State v. Steeves* (1896) 29 Or. 85, 43 Pac. 947; *Comfort v. Masser* (1888) 121 Pa. 455, 15 Atl. 612; *Houston & Texas Ry. v. Terrell* (1888) 69 Tex. 650, 7 S. W. 670; *State v. Thompson* (1902) 24 Utah, 314, 67 Pac. 789; *Fowlies Adm'x. v. McDonald* (1910) 85 Vt. 438, 82 Atl. 677; *Hoyt v. Indep't. Co.* (1909) 52 Wash. 672, 101 Pac. 367; *Carpenter v. Hyman* (1910) 67 W. Va. 4, 66 S. E. 1078. All of these cases exhibit the practice of permitting examination prior to challenge, though some of them are not direct decisions that such examination is a matter of right. In some jurisdictions, it is said that the statute authorizing peremptory challenges necessarily implies the right of preliminary examination. In some states such right is expressly conferred by statute. In an early North Carolina case it was said: "A party has no right to examine a juror or any other person by way of fishing for some ground of exception." *State v. Creasman* (1849, N. C.) 10 Ired. 395. The result was that in order to secure an examination, it was necessary to challenge; and the opposing party might admit the challenge, and thus eliminate a perfectly qualified juror whom the challenger, if the facts were known, might desire to retain. This led to the passage of Laws, 1913, ch. 31, sec. 6, which confers the right of examination prior to challenge. See *State v. Christy* (1916) 170 N. C. 772, 87 S. E. 499. Minn. Rev. Laws, 1905, sec. 5386 also confers such right. Prior thereto the matter rested entirely within the discretion of the trial court. *State v. Smith* (1894) 56 Minn. 78, 57 N. W. 325. In Connecticut the statute gives such right in civil actions. *Zalewski v. Waterbury Co.* (1914) 89 Conn. 46, 92 Atl. 682; in criminal causes the matter rests in the discretion of the trial court and its ruling will not be disturbed in the absence of a showing of abuse of discretion. *State v. Lee* (1897) 69 Conn. 186, 37 Atl. 75. See also the New Jersey statute, *supra* note 11.

varies. In some jurisdictions the court makes a preliminary examination and then puts further questions upon the suggestion of counsel;[13] in others, the court, after the preliminary examination, turns the jurors over to counsel for further questioning;[14] in still others the entire examination is conducted by counsel.[15] In all the scope of the examination is not unlimited, merely because there is no precise issue made by a challenge and its denial. Any question which calls for facts that will enable counsel to determine the advisability of challenging for cause or peremptorily is proper; but the examination is conducted under the supervision of the trial judge, and his ruling upon the propriety of a particular question will not be reversed except for abuse of discretion.[16] There is, therefore, no reason for the unseemly spectacle, occasionally witnessed, of a court permitting counsel to waste days and weeks in irrelevant and useless inquiries addressed to prospective jurors. The remedy for such disgraceful proceedings is not a reversion to an outgrown procedure which makes the right of challenge of slight value but the installation of trial judges with the character and energy to exercise their discretion sanely and courageously.

E. M. M.

SEARCH, SEIZURE, AND THE FOURTH AND FIFTH AMENDMENTS

In the light of a number of recent decisions of the Federal Supreme Court, it seems safe to assert that the cherished rights of the people to security in their persons, houses, papers, and effects against unreasonable searches and seizures, as vouchsafed them by the Fourth Amendment to the Federal Constitution, are in no immediate danger of dissolution. Every man's home is still his castle; and this fundamental doctrine of personal freedom, fought for and achieved by the valiant Wilkes, over a century and a half ago in England,[1] still flourishes with a sturdy vigor. Its renewed vindication by the courts has been partly occasioned by activities of various over-zealous federal agents in the enforcement of the Eighteenth Amendment.

The use of the search warrant for the apprehension of stolen goods was exercised in England from the earliest times.[2] It is to the abuse

[13] See e. g. *Williams v. State* (1921, Miss.) 87 So. 273; *Funches v. State* (1921 Miss.) 87 So. 487.

[14] See e. g. *State v. Ellis, supra* note 12.

[15] This is the practice in most of the cases cited in note 12 *supra*.

[16] *Union Pacific Ry. v. Jones, supra* note 12; *Martin v. Lilly* (1919) 188 Ind. 139, 121 N. E. 443; *National Bank v. Romine* (1911) 154 Mo. App. 624, 136 S. W. 21; *Strong v. State* (1921, Neb.) 183 N. W. 559; *State v. Ellis, supra* note 12; *State v. Turley* (1913) 87 Vt. 163, 88 Atl. 562; *Carpenter v. Hyman, supra* note 12. The same doctrine is indicated in most of the cases cited in note 12 *supra*.

[1] *Wilkes Case* (1763, C. P.) 19 How. St. Tr. 982. See Cooley, *Constitutional Limitations*, (7th ed. 1903) 426, note.

[2] Blackstone, *Commentaries*, *290.